

(1999) 08 DEL CK 0142

In the Delhi High Court

Case No : CMs. 6868/98 and 786 and 7370/99 in CWP. No. 3039/98

Col. Dhama B.S.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 18-08-1999

Acts Referred:

Air Force Act, 1964 — Section 102, 103
Constitution of India, 1950 — Article 226

Citation : (1999) 81 DLT 255 : (1999) 51 DRJ 15

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : C.M. Khanna, for the Appellant; Rakesh Tikku and Y.D. Nagar, for the Respondent

Judgement

A.K. Sikri, J.—By this order I shall dispose of the CMs.

2. In order to appreciate the submissions made by both the parties in support of their respective CMs it would be appropriate to notice the basic facts in the writ petition.

3. Petitioner has filed the present writ petition against order dated 5.6.1998. A perusal of the said order would show that it is an order by which warning of discharge from service is given to the petitioner. It states that there are four entries of punishment (three red ink entries and one black ink entry) given to the petitioner during his service career and one more punishment entry would render him liable for discharge of service under Rule 18(2)(g) (2i) of the Air Force Rules, 1969.

4. Petitioner's contention is that these entries were given unfairly and arbitrarily. Respondents have filed counter-affidavit justifying the recording of these entries and their issuing of warning letter dated 9th June, 1998. This is a matter which is to be considered while dealing with the civil writ petition itself.

5. Perusal of the record shows that in the Civil Writ Petition formal show cause

notice was not issued however counter-affidavit was filed by the petitioner on 21st August, 1998 and when, the matter came up for hearing on 27th August, 1998 petitioner was granted time to file the rejoinder and the case was adjourned to 11th December, 1998. On 11th December, 1998 it was renotified for 15th February, 1999. At this stage, petitioner filed CM.786/99 dated 23.1.1999 alleging that respondents were proposing to initiate court martial proceedings on the basis of allegation relating to 1996 which are the same charges the validity of which has been challenged in this writ petition. A prayer was made for staying of such proceedings. On 28th January, 1999 order was passed staying court martial proceedings (may be stated that in this order CM.6868/98 is mentioned which was an application filed Along with writ petition and in which no order was passed, presumably this was the order passed in CM.786/99). Respondents have filed their reply.

6. While these applications were pending petitioner filed another CM. 7370/99 in which petitioner has alleged that he is kept in close arrest and direction is sought to release the petitioner from close arrest. On the other hand, respondents have filed CM. 7576/99 seeking preponement of the case (which was adjourned to 4.11.1999) and hearing of the miscellaneous applications.

7. It may be mentioned that CM. 7576/99 came up for hearing on 1st July, 1999 when none was present but notice in this application was issued for 9.8.1999. In the meantime, CM.7370/99 came up for hearing on 8th July, 1999 and on that date it was directed that this application be listed for hearing on 13th July, 1999. On 13th July, 1999 the CM was adjourned to 19th July, 1999 for hearing and in the meantime parties were directed to complete the pleadings. On 19th July, 1999 when the CM.7370/99 was heard it was felt that CMs which are inter related may be heard together. Accordingly, arguments are addressed by counsel for both the parties in CMs.6868/98,768/99, 7370/99 and 7576/99.

CM.6868/98 and 786/99

8. Both these applications can be decided by common order as prayer in these applications is substantially the same. In CM.6868/98, petitioner has prayed for interim order directing respondents not to take disciplinary proceedings against petitioner without the prior permission of the court or restrain the respondents from terminating the service of the petitioner during pendency of the petition. Petitioner has prayed for interim stay order restraining the respondents from conducting the court martial or putting him under arrest or terminating his services during the tendency of the writ petition.

9. The charges on the basis of which District Court Martial ("DCM", for short) is convened against the petitioner are annexed by the respondents as Annexures R-1 and R-2 Along with reply dated 12th February, 1999 to CM.6868/98. A perusal of the said chargesheet would show that most of the charges are absents without leave (as per chargesheet No. 1) and over-staying leave granted to the petitioner (as per chargesheet No.2)

10. Learned counsel for the petitioner has contended that perusal of these charges would show that they are on the face of it is false and forged. In support of his contention Mr. C.M. Khanna, counsel for the petitioner has referred to annexures R-3, R-4, R- 5 as well as averments made in the rejoinder to CM.6868/98. On the basis of aforesaid documents and averments, counsel for the petitioner has tried to contend that the petitioner was not unauthorisedly absent and false charges have been framed against him. It is also argued that these applications relate to the period 1996-97 and 1998. However, no cognizance was taken and instead in June 1998, impugned order dated 9.6.1998 was served upon the petitioner recording four red entries and administering warning to the petitioner. Now, Mr. C.M. Khanna contended, respondents could not initiate court martial proceedings on the basis of alleged unauthorised absence during the year 1996-98. He contends that on the same bundle of facts disciplinary action is initiated whereas earlier vide order dated 9.6.1998 it was only an administrative action which was contemplated by the respondents as is clear from order dated 9.6.1998 impugned in the writ petition and respondents cannot be permitted to take administrative action for some instances of absence and disciplinary action for another instance of unauthorised absence. Such an action is motivated, arbitrary and has been taken to harass the petitioner and it does not pass the test of reasonableness. In support of his contention, petitioner has also referred to a judgment of Hon"ble the Supreme Court in the case Kuldeep Singh Vs. The Commissioner of Police and Others, . It is thus contended that there was no ground to charge sheet the petitioner. It is also alleged that nature of offence is petty and who exercise is done to deny him pension which the petitioner would earn otherwise on completing 15th years of service. The respondents are harassing him and with malafide intention chargesheet is issued. It is also contended that full opportunity in terms of Rule 24 of the Air Force Rules is not given to the petitioner.

11. On the other hand, Shri Rakesh Tikku, learned counsel for the respondent has made the following submissions in opposing the prayer in the aforesaid CMs.

1. These CMs are not maintainable as they do not arise out of the prayer made in the main petition. It is contended that convening of DCM is an independent action, which has nothing to do with order dated 9.6.1998 impugned in the main petition. If the petitioner has any grievance appropriate course for him is to file separate writ petition and this is not off-shoot of the main writ petition. Therefore, petitioner"s prayer to stay the DCM proceedings in the CM is not maintainable.

2. Petitioner has not come to the court with clean hands and has played fraud on the court by placing false chargesheet dated 9.12.1996 as annexure to his application. According to the respondents, the correct chargesheet are dated 13.1.1999 which are annexures R-1 and R-2 filed at page 106 and 109 of the paper book.

3. Petitioner made wrong statement in alleging that DCM is oh the same

applications relating to the order of 1996 which is the subject matter of the writ petition and by making this false averments in the CM.786/99 petitioner has obtained ex-parte stay dated 28th January, 1999.

4. On merits it is stated that the instances of unauthorised absence as mentioned in chargesheet No. 1 are totally different from the instances on the basis of which communication issuing warning dated 9th June, 1998 was given to the petitioner against which petitioner filed the instant writ petition. It is mentioned that the red entries given to the petitioner, as per the petition itself are dated 1.11.1995, 28.10.1996 and 18.11.1996 whereas a perusal of chargesheet served upon the petitioner would show that he is charge sheeted for unauthorised absence from 16.11.1996 onwards on different occasions which go up to 12.10.1998 explaining the circumstances in which DCM is convened. The respondents, have submitted in reply affidavit to CM.6868 as under :-

"That the petitioner Cpl Dhama B.S. is habitual absentee and absented himself without leave on the following occasions and thus committing offence u/s 39 of Air Force Act, 1950.

From 0730 h 16.11.96 to 0730 h 18.11.96

From 0730 h 17.12.96 to 0730 h 19.12.96

From 0730 h 20.12.96 to 0930 h 26.12.96

From 0730 h 27.12.97 to 1100 h 09.01.97

From 0730 h 13.01.97 to 0730 h 17.02.97

From 0730 h 19.02.97 to 1040 h 21.02.97

From 0730 h 19.11.97 to 0730 h 24.11.97

From 0700 h 11.06.98 to 0700 h 16.06.98

From 0700 h 17.06.98 to 0945 h 29.06.98

From 0001 h 15.09.98 to 0700 h 12.10.98

5. That the petitioner 693440-G Cpl Dhama BS has been working in Aircrew Examining Board, Air Force Station Hindan since 14 March 1990. Normal tenure at one station is 4-5 years. He has been transferred on 25 Sep. 1995 to Air Force Station Jaisalmer. He requested for deferment of the transfer to facilitate the treatment of his child. The respondent considered his request sympathetically and his transfer was deferred. The petitioner was again transferred on 19 Feb. 1996 to Pune with effect from 25 Mar. 1996 with his personal request as Cardiac facilities are available there being a Command Hospital situated with all modern facilities. The petitioner got his child operated in AIIMS with the help of Rs. 80,000/- grant provided by Air Force Group Insurance Scheme. On this ground his transfer was deferred up to 25 May 1996. On 23 May 1996, the petitioner refused to move out on posting and obtained stay order by filing CWP No.

2065/96 from the Hon"ble Court. This Hon"ble Court, directed the petitioner to obtain Medical opinion from the Medical Specialist from AIIMS about the" condition of his child. The Medical Board was constituted on 2 Dec. 1996. That Col. Dhama BS never presented his child before the Board, inspire of the arrangement made by the respondent by writing the letter to AIIMS and engaged on Ambulance for this purpose which awaited at about 8 hours at Air Force Hospital Hindan. But Col. Dhama BS did not turn up with the child. That on 14 Feb. 97, Col. Dhama B.S. filed an Additional Affidavit and the Hon"ble Court was pleased to direct the Chief of the Air Staff to investigate the matter and submit a report within three weeks. The orders of this Hon"ble Court were complied with. That this Hon"ble Court on 14 May 98 vacated the interim stay order granted and directed Col. Dhama BS to join at Pune with his family members.

6. That in the month of June 1998, Cpl Dhama BS filed CWP.No.3039/98 with an application for Ex parte Ad Interim stay order directing the respondent from taking any disciplinary action against the Cpl Dhama BS without the prior permission of the Hon"ble Court or to restrain the respondent from terminating the services of the Cpl Dhama BS during the pendency of this petition. The above writ came up for hearing on 26 June 98 before the Vacation Judge who listed the matter for 08.7.98. On 08.7.98 the petitioner argued the matter but the Court did not grant any stay and directed the respondent to file reply.

That the petitioner remained absent on the above dates mentioned. This conduct of the petitioner was investigated and a Summary of Evidence was recorded under the orders of Commanding Officer. The petitioner was given full opportunity to explain his conduct. The Summary of Evidence was perused by the Commanding Officer who subsequently made an application to ADC- InC, WAC IAF to try Col. Dhama BS by District Court Martial. On 18.1.1999 District Court Martial was ordered by HO WAC, IFA for the trial of the petitioner for 10 charges of AWL u/s 39 of the Air Force Act, 1950. With effect from 0730 h on 20 Jan. 1999 the petitioner again absented himself from duty and surrendered back at Unit at 0730 h on 1.2.99. During this absence he obtained exparte stay order from Hon"ble High Court of Delhi against the progress of District Court Martial."

7. I have considered the rival contentions of both the counsel. At the outset, I am inclined to accept the submission of the respondent that convening of DCM on the basis of allegations made in the chargesheet and the circumstance in which it was initiated as stated in the reply to CM.6868/98 is distinct and separate cause of action and it is not related to the subject matter of the main petition. Therefore, CM.786/99 seeking stay of DCM warrant to be dismissed on the ground of maintainability itself.

8. In fact, the averments of the petitioner in CM.786/99 to the effect that respondents are proposing to hold court martial proceedings on the same charge, the validity of which has been challenged in the writ petition is clearly false. As notice above, the charges mentioned in the chargesheet on the basis of which DCM is convened are totally different from the allegations which are

subject matter of red entries. Therefore, CM itself is based on wrong averment and presumptions.

9. The circumstances in which DCM proceedings have been convened, as mentioned by the respondents and extracted above, it is stated by the respondents that conduct of the petitioner was investigated and summary of evidence was recorded under the orders of Commanding Officer. This summary of evidence was perused by the Commanding Officer who made application to ADC-In-C, WAC, I.A.F. to try the petitioner by DCM. On 18.1.1999, DCM was ordered by H.Q., WAC, I.A.F. This, according to the respondents, is proper procedure as laid down under the provisions of the Air Force Act and the rules were followed by conducting court of enquiry which led to ordering DCM. Be as it may, the matter is still at a stage where DCM is to be held against the petitioner. Needless to mention, petitioner would be given proper opportunity to defend himself in accordance with the procedure laid down in Air Force Act and Air Force Rules. At this stage, the application for staying of, DCM is clearly premature. It is only when some order adverse to the petitioner is passed that the petitioner will have right to approach the court, that too after exhausting departmental remedies. In a somewhat similar circumstances in the case of IC.368, Maj. Suresh Rao versus Union of India in CW. 2707/97 where chargesheet was issued against the army officer and proceedings initiated pursuant thereto were challenged at enquiry stage, this Court refused to interfere at the stage of enquiry and dismissed the writ petition vide judgment dated January 20, 1998. It has been held by Hon"ble Supreme Court in a number of cases that the intervening stage, when the enquiry is still pending, court should not interfere with such enquiry proceedings.

10. Learned counsel for the petitioner contended that court can interfere in the exercise of its jurisdiction under Article 226 of the Constitution of India when it can be shown that the court martial proceedings are based on no evidence or when on the fact of it charges framed against the petitioner are frivolous. In support of his contention, the petitioner has relied upon judgment of Hon"ble Supreme Court in the case of Kuldeep Singh Vs. The Commissioner of Police and Others, . Learned counsel relied upon the following observation made in para 8 thereof:-

The findings recorded in a domestic enquiry can be characterised as pervers, if it is shown that such findings are not supported by any evidence on record or are not based on the evidence adduced by the parties or no reasonable person could have come to those findings on the basis of that evidence. This principle was laid down by this Court in State of A.P. v. Rama Rao AIR 1964 SC 1723 in which the question was whether the High Court under Article 226 could interfere with the findings recorded at the departmental enquiry. This decision was followed in Central Bank of India Ltd. Vs. Prakash Chand Jain, and Bharat Iron Works Vs. Bhagubhai Balubhai Patel and Others, . In Rajinder Kumar Kindra Vs. Delhi Administration through Secretary (Labour) and Others, , it was laid down that

where the findings of misconduct are based on no legal evidence and the findings based on no legal evidence and the conclusion is one to which no reasonable man could come, the findings can be rejected as perverse. It was also laid down that where a quasi-judicial tribunal records findings are its mere ipso dixit or based on conjectures and surmises, the enquiry suffers from the additional infirmity of non-application of mind and stands vitiated.

11. There cannot be any quarrel about the aforesaid proposition of law which is well established. However, that was the case where the proceedings were challenged after its conclusion and when the punishment was imposed upon the charge sheeted official, the Supreme Court on examination of the material before it, came to the conclusion that findings against the charge sheeted official were wholly arbitrary and perverse. This case has no application to the facts and circumstances of the present case where proceedings are still pending.

12. Learned counsel for the petitioner however pointed out that no proper court of enquiry was initiated before the order of DCM. The respondents produced record relating to court of enquiry proceedings for my perusal and on perusal of these records I am prima facie satisfied that court of enquiry was done. It is not proper for me to express any final opinion at this stage except observing that it would be open to the petitioners to challenge the final order, if it is adverse to him, on all the grounds available including those stated in CMs. For the aforesaid reasons CM. 6868/98 and CM.786/99 are hereby dismissed. Interim order dated 28th January, 1999 is hereby vacated.

CM.7370/99

13. In this application the petitioner has alleged that he has been kept under close arrest since 1st February, 1999 and direction is sought against the respondents to release the petitioner from close arrest. It is stated that petitioner is not a criminal and he has been charged only with one type of offence i.e. for absence without leave which charges are also patently false. It is also alleged that petitioner was enrolled in the Air Force on/around 17th July, 1984 and in the normal course of event he shall complete 15 years of service to become eligible to earn pension in July 1999. However, as per rules the period spent in detention gets excluded from the length of reckonable service for the purpose of pension. In this view of the matter and for the reason of malice against the petitioner the respondents have put him under close arrest with intention to terminate his service before he becomes eligible to earn pension.

14. In the reply filed by the respondents it is stated that petitioner is habitual offender and absented himself unauthorisedly on various occasions which led respondents to initiate disciplinary action under Air Force laws and which culminated in order of assembly of DCM on 25th January, 1999. He again absented himself on 29th January, 1999 after coming to know of the order of convening of DCM and on 1st February, 1999 when the petitioner reported back to duty after absenting himself from duty he was kept under close arrest. It is

further pointed out that against his close arrest father of petitioner filed criminal writ petition No. 103/99 and after arguing the matter before this Court the said petition was dismissed as withdrawn. It is also pointed out that on 17th February, 1999 a telegram was received by the petitioner that his wife was serious, he was released from close arrest and sent on leave up to 25.2.1999. However, he did not report back to the unit on the expiry of the leave but got himself admitted in military hospital at Delhi Cantt. for lower back pain. From hospital he proceeded on six weeks sick leave. After he was found fit for duty he was kept under air force custody in terms of Rule 22 of the Air Force Rule, 1969.

15. File of Criminal Writ Petition No. 103/99 was summoned and I have perused that file which shows that this writ petition was filed against his close arrest and after argument the same was dismissed as withdrawn. Thereafter, present CM.7370/99 is filed. Therefore, this application is not maintainable and warrants to be dismissed on this ground itself.

16. Even otherwise, Section 102 of the Air Force Act, 1969 permits the authorities to take in, subject to the provisions of the said Act, a person charged with an offence, to be taken into air force custody. Section 103 of the Air Force Act casts a duty on the Commanding Officer to take care that a person under his common when charged with an offence is not detained in custody for more than 48 hours after committal of such person into custody is reported to him, when the charge is being investigated. It is already noticed above that the petitioner has been charge sheeted and DCM is convened against him. Thus, Section 102 of the Air Force Act comes into play which authorises the respondents to keep the petitioner under close arrest. Division Bench of this Court in its order dated 3rd February, 1998 in Criminal Writ Petition No.70/98 entitled Sq. Ld. J.S. Punia (Retd) v. Union of India and Ors. dismissed the writ petition in similar circumstances holding that no interference was called for due to the fact that a detainee was under air force custody on the basis of lawful authority. Following observations are worth quoting: -

The very fact that there is power available under the act authorising the respondents to put any person subject to the act including an officer the basis of which the detainee has placed under close arrest. It cannot be said per se the other grievances which the petitioners have by us for number of reasons. The petitioners can have recourse in accordance with law to those subject of course to their locus standi to raise such questions more particularly in view of the fact that the detenu himself has challenged the proceedings being held against him which are subjudice. We may, however, observe at this stage that the power of arrest of a person under the act has to be exercise. Keeping in view the object for which it is available, taking into consideration the gravity of the offence with which a person is charged, since detention effects liberty of an individual. It may not be more harsh than what is required in the circumstances. The restrictions imposed during detention also should not be harsher than what are required in the circumstances of the case.

17. Keeping in view the aforesaid observations that detention effects liberty of individual it would be appropriate that the case of the petitioner is reviewed after some time taking into consideration the nature of the offence inasmuch as he is charged that unauthorised absence only. It is hoped that the appropriate authority would take all the facts and circumstances including the behavior of the petitioner in custody and review his case relating to close arrest. With these observations CM.7370/99 stands disposed of.